B. ***The modern trend towards the liberalization of the Law of Evidence and the successful development of the truth, indicate the necessity for a final determination by this Court of these questions.***

Dean Wigmore has shown the confusion in the decisions relating to evidence prior to the adoption of Rule 43(a) of the Federal Rules of Civil Procedure.

> 1 *Wigmore, Evidence,* 3d ed. (1940) §§6a, 6b.

Dean Dobie, a member of the Advisory Committee, referred to the law of evidence in the Federal Courts as in a state of "veritable hodgepodge".

> *Callahan and Ferguson, Evidence and the New Rules of Court Procedure,* 45 Yale Law Journal 622.

The purpose of Rule 43(a) was the modernization and liberalizing of evidence law.

> *Green, Evidence and the Federal Rules,* 55 Harvard Law Review 197, 212, *supra.*

Rule 43(a) itself states, "In any case, the statute or rule which favors the reception of the evidence governs * * *".

This Court has recently reviewed the modern trend away from the English common law rules of evidence and has stated that it has and would exercise the power to change, in accordance with present day standards of wisdom and justice, outworn and antiquated common law rules which are contrary to modern experience and thought.

> *Funk* v. *United States,* 290 U. S. 371, 377, 381-2, 78 L. ed. 369, 373, 375.

This Court there quoted from an earlier decision, *Rosen v. United States,* 245 U. S. 467, 62 L. ed. 406:

> " 'In the almost twenty [twenty-five] years,' the court said, 'which have elapsed since the decision of the Benson Case, the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely almost universally, accepted in this country and in Great Britain.' * * * 'we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here * * * ' " (P. 377; p. 373).

This Court went on to say:

> "The rules of the common law which disqualified as witnesses persons having an interest long since in the main have been abolished both in England and in this country; and what was once regarded as a sufficient ground for excluding the testimony of such persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. Whatever was the danger that an interested witness would not speak the truth—and the danger never was as great as claimed—its effect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances. * * * " (P. 380; p. 374).

"The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule" (P. 381; p. 375).

"'* * * and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume, that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mould and shape it into new and not less useful forms.' * * *" (P. 383; p. 376).

"To concede this capacity for growth and change in the common law by drawing 'its inspiration from every fountain of justice,' and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a 'flexibility and capacity for growth and adaptation' which was 'the peculiar boast and excellence' of the system in the place of its origin" (P. 383; p. 376).

While we believe, as we shall show, *infra*, Point II that under Rule 43(a), the Federal Courts are free to apply the modern rules of evidence and are not subject to antiquated common law rules of competency, it may be argued that the "dead man's" statutes are not part of the common law and

beyond the power of this Court to modify. The contrary is the fact. The "dead man's" statutes did not make incompetent any testimony which would have been competent at common law.

At common law witnesses were disqualified by interest. When the need for the removal of the common law disqualification by interest became apparent throughout the United States, statutes were enacted which removed the general disqualification by interest with an exception, however. This exception was the so-called "dead man's" statutes. This exception originated no new incompetency, but only continued in certain cases the old incompetency of the common law.

> 2 *Wigmore, Evidence,* 3d ed. (1940) §578, p. 695;
> 5 *Jones, Commentaries on Evidence,* 2d ed. §223, p. 4251.

Thus in the New York "dead man's" statute, we have the limited perpetuation in statutory form of a common law rule.

The authorities listed in the petition for a writ of certiorari, page 7, *supra,* show that the "dead man's" statutes are now outworn.

Rule 101 of the American Law Institute Model Code of Evidence reflects the present day views. That rule is as follows:

> "Every person is qualified to be a witness as to any material matter unless the judge finds that
>
> (a) the proposed witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury either directly or through interpretation by one who can understand him, or
>
> (b) the proposed witness is incapable of understanding the duty of a witness to tell the truth."

POINT II.

The decision of the Circuit Court of Appeals, in so far as it requires the District Court to follow state statutes on questions of the competency of witnesses is in conflict with Rule 43(a) of the Federal Rules of Civil Procedure.

The Circuit Court of Appeals has held that the testimony of the individual defendant herein was inadmissible because barred by §347 of the New York Civil Practice Act (R. 439).

In doing so, the Circuit Court of Appeals has apparently assumed—we believe without justification—that the Competency of Witnesses Act is still in full force and effect and that the provisions of the forum-state "dead man's" statute are binding upon it.

Dean Wigmore, however, is strongly of the opinion that the Competency of Witnesses Act has been supplanted by Rule 43(a).

Dean Wigmore, after discussing the four Federal Acts relating to evidence in effect prior to the adoption of Rule 43, *i.e.*, Rule of Decision Act, 28 USCA §725, R. S. §721, Mode of Proof Act, 28 USCA §635, R. S. §862, Competency of Witnesses Act, 28 USCA §631, R. S. §858 and Conformity Act, 28 USCA §724, R. S. §914, presents an answer to the question in point as follows:

> "(A) *Does Rule 43 supplant and displace the Federal Acts?*
>
> "Nowhere in the body of the rules is there a provision expressly repealing or discarding these or other statutes on Evidence. On this point, however, the Act of 1934 itself declares that 'all laws in conflict therewith [*i.e.* the Rules] shall be of no further force or effect.' Now the Mode of Proof Act (R. S. §862) dealt only with

equity and admiralty, and the Conformity Act (R. S. §914), dealt only with practice in general (other than in equity and admiralty); so that these two may be regarded as no longer applicable. The Rules of Decision Act (R. S. §721) is supplanted, for the Advisory Committee's Note to this Rule declares that 'the second and third sentences [of par. (a)] on admissibility of evidence * * * modify U. S. Code, tit. 28, §725 [R. S. §721] in so far as that statute has been construed to prescribe conformity to State rules of evidence.'

"But the Competency of Witnesses Act (R. S. §858), the Advisory Committee's Note tells us, is 'in effect continued.' This Act, however, is not worded the same as Rule 43; for the words of the Act (as amended in 1906) direct that the 'competency of a witness * * * shall be determined by the laws of the State or Territory', while Rule 43 directs that it shall be determined 'in like manner', and this 'like manner' of the preceding two sentences provides *three* choices for the Trial Court, only one of which is the local State law.

"As this wording is 'in conflict' with that of the Competency of Witnesses Act (R. S. §858), it may be inferred, therefore, that Rule 43 supplants it, and that R. S. §858 is *not* any longer in effect. This conclusion is important because it leaves the trial Courts free hereafter to ignore any prior judicial interpretation of that act.

* * * * *

"(B) *Does Rule 43 supplant and displace the numerous judicial decisions interpreting the above four Acts?* Since it appears from the foregoing comments that the Mode of Proof Act and the Conformity Act are no longer applicable, that the Rules of Decision Act is expressly understood to be displaced, and that the Competency of

Witnesses Act is by implication displaced, it may be inferred that the prior judicial decisions interpreting them are no longer *binding*. 'For this relief, much thanks'."

1 Wigmore Evidence, 3rd Edition (1940), Sec. 6c, p. 199.

Judge Frank in a dictum in a recent opinion in *Zell* v. *American Seating Co.*, 138 F. 2d 641, 643, indicated that in matters of evidence state court decisions are not binding upon the Federal Courts.

Professor Green in *Evidence and the Federal Rules*, 55 Harvard Law Review 197, *supra*, expresses the opinion that the District Court may, under Rule 43(a), admit in evidence what it thinks ought to be admitted when either the United States or the state in which the trial court is sitting, but not both, exclude the type of evidence in question and when one of the two jurisdictions has not laid down a controlling rule.

> "When the particular question of admissibility has not yet been decided by any federal equity or law case may the trial court hold that the proper application of the principle involved makes the item admissible although the law of the forum-state excludes it? When the federal decisions exclude the evidence and the point has not been decided by the courts of the forum-state may the district court assume that the forum-state rule admits in accord with what the district court considers the better view? It is submitted that Rule 43(a) should be interpreted so as to admit in evidence what the district court thinks ought to be admitted when either the United States or the state in which the trial court is sitting has not laid down a controlling rule, and the other excludes the type of evidence in question."
>
> *Green, Evidence and the Federal Rules*, 55 Harvard Law Review, 197, 224.

Alexander Holtzoff, Esq., Special Assistant to the Attorney General, after commenting upon the lack of opinions in the Federal Courts on questions of evidence, calls attention to the observation of Judge Caffey in the Government Anti-trust Law action against the Aluminum Company of America that:

> "Rule 43 does not deal with the law as to what testimony should be excluded. It deals only with what is admissible under the law of the United States or the law of the State in which the particular court sits. It is intended to liberalize admissibility of testimony, but has nothing to do with what should be excluded."
>
> *United States* v. *Aluminum Company of America,* 4 Dept. Justice, Bull. 18, 1 Fed. Rules Service 43a. 3, case No. 1.

Mr. Holtzoff summarized the point in that case as follows:

> "It so happened that in that particular instance the State law required the exclusion of the evidence. The Federal cases had not settled the question or worked out a Federal rule. The judge indicated that he was not bound by the New York rule, but that, since the question was an open one in the Federal courts, he was free to develop a Federal rule on the subject. He concluded that, if the Federal rule evolved in this manner should admit the evidence, he was free to overrule the objection."
>
> *Twelve Months of New Federal Rules,* 26 American Bar Association Journal 49.

POINT III.

The decision of the Circuit Court of Appeals, in so far as it has found without any testimony whatsoever that the joint adventure herein was conducted under an express oral agreement when plaintiff's counsel have persistently taken the position that there was no such oral agreement, is in conflict with a reported opinion of a federal court of similar appellate jurisdiction.

The Trial Court found that an oral agreement for the conduct of the joint adventure was made on June 8, 1933 (R. 135, 161). The Circuit Court of Appeals affirmed (R. 437).

Plaintiff's trial counsel stated at the trial and on the accounting before the Special Master herein that there was no oral agreement made on June 8, 1933 and that plaintiff did not claim that any such oral agreement was made (R. 229, 230, 333).

In their brief in the Circuit Court of Appeals, plaintiff's counsel stated:

> "Plaintiff, of course, does not rest upon any oral agreement actually arrived at and definite in all its terms on June 8, 1933 (p. 26).
>
> "It is undisputed that no definitive agreement was made on or prior to June 8, 1933" (p. 4).

The parties hereto were in accord at the trial and thereafter that no oral agreement was made on June 8, 1933 such as was found by the Trial Court. Plaintiff's counsel by his statement at the trial thus in effect withdrew the request in the complaint that the Court find that such an oral agreement existed. It is submitted that the Court should not have found that there was such an oral agreement in view

of the fact that both parties claimed that there were entirely different agreements.

In finding that there was an oral agreement made on June 8, 1933 when all the parties to the action insisted that there was no such agreement, the Circuit Court of Appeals' decision herein is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in the case of *Lenox Clothes Shops, Inc.* v. *Commissioner of Internal Revenue,* 139 F. 2d 56, 60, where the latter court held that admissions and stipulations of counsel during the trial of a case removed from the case any issue as to the subject matter of the admissions and stipulations.

POINT IV.

The decision of the Circuit Court of Appeals, in so far as it holds that a dissolved corporation whose existence has terminated under the laws of its state of incorporation, nevertheless continues to exist in a foreign state because it had, prior to its dissolution, designated the Secretary of State of the foreign state to accept service of process on its behalf in actions against it, is in conflict with a decision of this Court, a decision of the highest court of the forum-state and the decision of a federal court of similar appellate jurisdiction.

The corporate defendant, a Delaware corporation was dissolved under the laws of Delaware on December 16, 1937 (R. 439). Under the laws of that state then in effect and in effect until April, 1941, the existence of the corporate defendant was continued for three years after dissolution until December 16, 1940 (R. 439). The judgment herein was entered on October 28, 1943 (R. 354).

Prior to its dissolution, the corporate defendant had qualified to do business in the State of New York. In connection

therewith it had designated the Secretary of State of New York its agent upon whom process might be served.

The Trial Court held that the corporate defendant was dead in Delaware citing this Court's decision in *Oklahoma Natural Gas Company* v. *Oklahoma*, 273 U. S. 257, 71 L. ed. 634 (R. 300).

But the Trial Court went on to hold that the corporate defendant in designating the Secretary of the State of New York as its agent for the service of process had contracted with the State of New York and that its existence, therefore, continued in New York despite the termination of its existence in Delaware (R. 300). The Circuit Court of Appeals approved the Trial Court's reason (R. 440).

It is submitted that in so holding, the decision herein is in conflict with the decision of this Court in *Oklahoma Natural Gas Company* v. *Oklahoma*, 273 U. S. 257, 259, 71 L. ed. 634, 635, where this Court held:

> "It is well settled that at common law and in the Federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. * * * It follows, therefore, that as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant. To allow actions to continue would be to continue the existence of the corporation pro hac vice. But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation. The matter is really not procedural or controlled by the rules of the

court in which the litigation pends. It concerns the fundamental law of the corporation enacted by the state which brought the corporation into being."

It is submitted also that the decision of the Circuit Court of Appeals herein is in conflict with the decisions of the New York Court of Appeals in *Matter of National Surety Co.* (*Laughlin*), 283 N. Y. 68, certiorari denied, 311 U. S. 707, 85 L. ed. 459, and the United States Circuit Court of Appeals for the Fifth Circuit in *National Surety Co. of New York* v. *Cobb,* 66 F. 2d 323, certiorari denied, 290 U. S. 692, 78 L. ed. 595.

In the first of those cases the New York Court of Appeals pointed out that the designation of the Secretary of State as the statutory agent for the service of process was analogous to a power of attorney granted by an individual which ceases upon the death of the individual.

Respectfully submitted,

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